



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/00012/2019
IA/00013/2019

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On Tuesday 15 October 2019

On Friday 18th October 2019

Before

UPPER TRIBUNAL JUDGE SMITH

Between

**(1) RAJANI SHRESHTHA
(2) SAMIR KUMAR SHRESHTHA
(anonymity direction not made)**

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms A Patyna, Counsel instructed by Kidd Rapinet solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellants appeal against a decision of First-tier Tribunal Judge E M M Smith promulgated on 11 July 2019 ("the Decision") dismissing the

Appellants' appeals against the Respondent's decision dated 28 January 2019 refusing the First Appellant leave to remain as a Tier 4 (student) with the Second Appellant as her dependent and refusing their human rights claim in consequence.

2. The Appellants came to the UK in October 2009 with leave as a student and dependent. Their leave was extended following a successful appeal to 20 April 2014. On 19 September 2012, the First Appellant undertook a TOEIC test at London College of Media & Technology. On 17 April 2014, the Appellants made the applications (supported by the TOEIC certificate) which led to the Respondent's decision under appeal. There was a delay of over four years in the making of a decision on the Appellants' applications. So far as their family circumstances are concerned, the Appellants have a child born on 16 January 2012 who lives with her grandparents in Nepal.
3. The Respondent refused the Appellants' application on the basis that the First Appellant had used a proxy test-taker when taking her English language test. This is therefore one of the many so-called "ETS" cases. The Judge having heard oral evidence from both Appellants concluded that the Respondent had made out her case in that regard and that the First Appellant had used deception. Having reached that finding, he went on to consider Article 8 ECHR and concluded that the Respondent's decision was not disproportionate.
4. The Appellants raise four grounds of appeal. The first two grounds concern the Judge's consideration of the evidence surrounding the ETS issue. The third ground asserts that the Judge adopted the wrong burden of proof on that issue. The fourth ground challenges the Judge's conclusion in relation to Article 8 ECHR independently of the ETS issue and based on consideration of the Respondent's delay in deciding the Appellants' applications for over four years.
5. Permission to appeal was granted by First-tier Tribunal Judge Neville on 9 September 2019 as follows (so far as relevant):

"... 3. Whereas the Judge was not required to mention each and every piece of evidence put before him, the appellants' skeleton argument placed primary reliance on the first appellant adducing evidence of a 2011 IELTS course, together with a 2008 bachelor's degree in Nepal, a 2014 M.A. from Anglia Ruskin University, and a 2014 postgraduate diploma in the UK, all taught in English. The Judge does not mention these qualifications at all. As to the second ground, while the first appellant's level of English at the hearing is a legitimate factor, given the weight placed on this factor by the Judge he arguably ought to have engaged to some degree with the appellant's evidence on language ability that had the *potential* to point the other way. The weight the Judge gave to the level of English at the hearing means that any error has the potential to be material.

4. The other grounds are consequential on the first two, so may also be argued.”
6. The appeals come before me to decide whether the Decision contains a material error of law and if I conclude that it does, either to re-make the decision or remit the appeal to the First-tier Tribunal for redetermination.

DISCUSSION AND CONCLUSIONS

7. Judge Neville commented that the third and fourth ground are consequential on grounds one and two. I do not agree with that analysis so far as ground three is concerned and since that concerns the application of the burden of proof, it is convenient to begin with that ground.

Ground Three

8. The Appellant relies on the statement at [18] of the Decision that “[i]n Immigration Appeals the burden of proof is on the appellant and the standard of proof required is a balance of probabilities”. As a statement of general principle, that is correct. Moreover, these are appeals generated by the refusal of a human rights claim and therefore that analysis of the overall burden on the central issue is correct.
9. The Judge went on at [27] to [28] of the Decision to refer to two cases dealing with the burdens and standards of proof specific to the ETS issue. Ms Patyna submitted that the Judge had there set out the correct standard, but it was not clear that this had been applied and his consideration was infected by what was said at [18] of the Decision. I disagree. The two case-law citations make it abundantly clear that the Judge understood the shifting burden which applies on this issue. Moreover, he went on to say at [29] of the Decision that he was satisfied based on the look-up tool and evidence of results from the college in question that the Respondent had “discharged the initial burden of proof and established a prima facie case for the appellant to answer”. What follows then is a consideration of the Appellants’ case and evidence.
10. Ms Patyna argued that what was said at [33] suggested that the Judge used the look-up tool and generic evidence as part of the analysis of the Appellants’ case and therefore placed the burden on them. I struggled to understand this point. What is said at [33] of the Decision is supportive of the Appellants and simply makes the point that the evidence of voice analysis has to be viewed with a certain amount of caution because of the risk of false positives. That then leads to the Judge’s round up of the evidence on both sides at [34] of the Decision (as set out below) and conclusion as to deception.

11. There is no error disclosed by ground three. The Judge correctly applied the shifting burdens of proof. The real issue in this case is whether, in so doing, he properly considered all the evidence.

Grounds One and Two

12. Grounds one and two are both concerned with the Judge's consideration of the evidence. Ground one asserts a failure to consider the documentary evidence of the First Appellant's previous studies conducted in the English language. The second asserts an over-emphasis on the First Appellant's level of spoken English during her oral evidence.
13. The Judge considered the Appellants' evidence at [23] to [26] of the Decision as follows:

"23. Throughout the appellant's evidence she had to be asked to repeat her answers because unfortunately her standard of English was very difficult to follow. I accept that a person giving evidence in court will be extremely nervous and that must be factored into my assessment of her evidence but having done that I found it very difficult to understand the account she was giving. Equally, I must factor into her favour the delay that has occurred in making a decision on her application and any questions about events in relation to the test over 6 years ago may be difficult to recall. She has however, in her statement (AB p2) set out in some detail the events that both led her to take the tests and the events of the day when she did. I assume for her to do that the delay has not disadvantaged her greatly.

24. Her evidence to me was that she had undertaken the test in 2012 because her college was merging with another college called Citizen 2000 however, the relevance of that answer did not become obvious. The appellant went on to explain that in June or July 2013 her college had difficulty with their licence which was eventually revoked. The appellant was asked by Mr Swaby why she would need to take a test in 2012 when she had leave until 2014 and how the problems in 2013 were relevant to her taking a test in 2012. The appellant explained that she thought it better to do it than wait. I asked the appellant when she eventually found a new college and she replied in January or February 2014 and she has stopped studying with her previous college in 2013. Mr Swaby asked the appellant if she had contacted ETS to get the recordings so she could establish whether it was her. She said she had not.

25. I asked the appellant various background questions to her life in Nepal and having asked her if she had children she replied she did and gave the date of birth as 16th January 2012. She confirmed that the child was sent to Nepal in 2013 to live with her maternal grandmother. The appellants have not seen the child since. Mr Swaby asked the appellant what her intentions were when she arrived in the UK and whether she intended to return to Nepal after her studies, she said she did.

26. When the 2nd appellant gave evidence, he was challenged by Mr Swaby and asked what his and his wife's intentions were when they had finished their studies. He said it was always the plan to stay in the UK. At this stage it was clear there were difficulties to his ability to explain his evidence in English so the court was adjourned to establish whether there was an interpreter present who could help. Fortunately, a court interpreter was sourced reasonably quickly in Hindi and it was confirmed that both understood each other so his evidence continued through the interpreter. When again asked by Mr Swaby what his intentions were when they first came he provided a different reply and said they were intending to return. He also confirmed that it was not until 2016-2017 that they decided not to go back. He was asked why there had been no mention in the application or in their statements about the birth of their child. He replied she didn't stay in the UK but he would apply for her to join them."

14. Having correctly stated the burden of proof which applies in relation to the ETS issue (see above), and having concluded that the Respondent had met her evidential burden, the Judge went on to say the following about the Appellants' evidence:

"30. In his submissions Mr Swaby focused on the need for the appellant to undertake a test 2 years before submitting an application. He submitted that it is possible that because the appellant was concerned at the status of her college she wanted to ensure she had the appropriate documentation in place to move to another college. The fact is that she did take a test at a time when she had no need to supports the fact that the only rational explanation is because she feared that she would need to move college with the need to take a new test. I cannot ignore the fact that both appellants standard of English when giving evidence was [to] poor (sic), a matter that Mr Swaby relied upon. I have taken into account she was nervous, but even if I factor that into my assessment of her evidence she was a very difficult witness to understand. It is possible that moving to a new college this difficulty would be noticeable and possibly that was why she decided to undertake a new test before she needed to."

15. The Judge then dealt with the generic evidence and the case-law in that regard before reaching his reasoned conclusions about what the totality of the evidence showed:

"34. I am satisfied that even if I factor into my assessment the potential of false positives and the explanation provided by the appellant of the events on the day of her test I am left with the fact that her English is clearly poor, she took a test 2 years before she needed to and has not provided any evidence to support her somewhat confused evidence as to when she knew she had to change college and therefore a need to take a new test. Having considered the account the appellants have provided I have assessed whether there is an innocent explanation which satisfies the minimum of plausibility of both the events of the day in question and the need to take the test. I am satisfied she has not provided an innocent explanation as to why she would need to take a test 2

years before her leave expired. Whilst she has provided details of the events on the day in question taken as a whole I am satisfied her account is simply not credible and when placed before her obvious difficulty speaking English she has not discharged the burden that is upon her and the respondent has discharged the burden and established to my satisfaction that the appellant used a proxy to undertake her tests in 2012. It is clear to me that had the appellant obtained the recordings from ETS it would have been clear whether she had or had not undertaken the tests. The appellant has not done that.”

16. As Mr Melvin pointed out, there are factors in this case which count against the Appellants unless they can be satisfactorily explained away. The First Appellant took a test two years before she needed to. The Judge was entitled to reach the conclusion that he did about the likely reason for that. Similarly, the Appellants had not obtained the voice recording of the test from ETS. It is now well known that appellants can obtain those voice recordings from ETS’s representatives in the UK. If the voice in that recording was that of the First Appellant, she would have a cast iron answer to the Respondent’s case. Her failure to request the recording is a factor telling against her as the Judge found. The Judge also had evidence of the percentage of cases where ETS test scores were found to be invalid at the college where the First Appellant took her test. That was also relevant to the overall assessment of the evidence. The Judge also considered and took into account the First Appellant’s evidence about the taking of the test ([23] and [34] of the Decision).
17. As Mr Melvin also pointed out, where what is at issue is whether an appellant can speak English to a standard suggested by his or her qualifications, the Judge is entitled to consider whether that appellant can speak English to that standard. As was pointed out in the rule 24 reply, a person who obtained a near perfect score in a speaking test, would be expected to be able to speak English to a fairly high standard (subject to considerations of a court setting and nerves which the Judge took into account). I was unable to find a copy of the test certificate on file, but I have no reason to doubt what is said in the rule 24 reply about the scores which the First Appellant is said to have achieved. I do not take into account what is said in the rule 24 reply about the precise level of English which would be expected in such circumstances as, as Ms Patyna pointed out, that evidence was not before the Judge.
18. However, I do not understand it to be the Appellants’ case that the Judge had to ignore his own assessment of the First Appellant’s level of spoken English. Their case is that, following what was said by the Tribunal at [80] of the decision in SM and Qadir v Secretary of State for the Home Department (ETS – Evidence – Burden of Proof) [2016] UKUT 229 (IAC) (“SM and Qadir”), the Judge should have been slow to place so much emphasis on this as reason for rejecting the Appellants’ case.

19. I do not discern any over-emphasis on this factor when rejecting the Appellants' case. As I have already pointed out, the Judge relied on other factors in addition to his own observation of the First Appellant giving evidence. He was entitled to take those factors into account. Ms Patyna also relied on the case of MK (duty to give reasons) Pakistan [2013] UKUT 641 and the lack of any detail leading to the Judge's assessment of the level of the First Appellant's spoken English. I accept that it may have been preferable for the Judge to give one or two examples of the difficulties in following evidence or the need for repetition of questions and answers. However, I would not have found this ground to disclose an error of law taken alone.
20. However, the stronger of these two grounds is ground one and the Judge's failure to have regard to evidence that the First Appellant had undertaken studies in English in the past. As is pointed out in the grounds, based on what is said at [79] to [80] of SM and Qadir such evidence may well be of greater value than an appellant's ability to speak English during a hearing. It is a material factor.
21. In this case, there is documentary evidence at Tabs B and C of the Appellants' bundle concerning the First Appellant's previous qualifications. Not all of that evidence is necessarily worthy of weight. The Masters' degree qualification taken at Anglia Ruskin University is said to be instructed and assessed in English but the First Appellant is said to have successfully completed "an approved programme" and it is not entirely clear whether that course involved face to face tuition; similarly the postgraduate diploma completed with EduQual. However, there is evidence at, for example, [AB/B/8] that the First Appellant completed her bachelor's degree in Nepal "in English medium" and her school leaving certificate at [AB/B/11] shows that she studied English at that time (although her marks are not particularly impressive). The First Appellant also undertook an "Intensive IELTS Preparation" at Blake Hall College over three months in 2009 and although there is no certificate in that regard there is at [AB/C/2] a certificate showing that she completed the course. The First Appellant also deals with her previous education at [14] of her witness statement.
22. For the reasons I give above, this evidence does not necessarily mean that the First Appellant's explanation will be accepted. However, in spite of Mr Melvin's valiant efforts to save the Decision by reference to [15] and [17] of the Decision where the Judge said that he had considered all the evidence but would refer only to that which was relevant, I am satisfied that the Judge did need to give the evidence of the First Appellant's past study record express consideration and that his failure to do so amounts to a material error of law. The Judge has considered most of the factors weighing for and against the Appellants, but this was evidence which had the potential to strengthen the Appellants' case. It needed to be considered and put into the balance with the other evidence.

Ground four

23. Strictly, having found an error of law to be established on ground one, I do not need to go on to deal with ground four. If the Appellants lose on the ETS issue, it is also highly unlikely that the Respondent's delay could swing the balance in their favour when assessing proportionality.
24. However, since the appeals will need to be reconsidered, it is necessary to say a little about this ground, particularly since it is the Appellants' case that the Judge misunderstood how delay was relevant.
25. The Judge mentioned the Respondent's delay as follows. First, at [12] of the Decision, the Judge noted that the Respondent had taken four years to consider and refuse the Appellants' application and that no explanation had been offered for this delay. This is of course one of a significant number of ETS cases which have been subject to litigation over a number of years (see the summary at [2] to [5] of SM and Qadir and the consideration of the generic evidence dating back to the Panorama programme and immediately before in January - February 2014). The applications made by these Appellants were in April 2014 and it is therefore quite possible that the general developments in ETS cases account for at least some of the delay. That is however an assumption on my part.
26. Second, the Judge considered delay to be potentially relevant on the basis that it might have affected the First Appellant's powers of recall in relation to the test (see [23] and [40] of the Decision).
27. However, as Ms Patyna pointed out, the delay is also relevant on the basis of the Appellants having been allowed to strengthen their private lives in the UK (see EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41 - "EB (Kosovo)"). That might perhaps be encompassed within the Judge's comment at [40] of the Decision the "neither appellant has returned to Nepal to see family or their child" in the period of delay.
28. Ms Patyna also submitted that the significant delay for which no good reason has been given leads to a diminution of the public interest in the maintenance of effective immigration control, thereby impacting on the proportionality assessment. That might be relevant if there is a systemic failure - see [16] of the judgment in EB (Kosovo) - but I doubt could have the same implications on the basis of one delay, particularly where, as here, an inference might well be drawn as to the reasons for at least some of it.
29. In any event, the Judge did deal with that submission. He did so at [41] of the Decision but found that it did not have that effect because the First Appellant had acted fraudulently. That was a conclusion open to him if the conclusion on the ETS issue was otherwise sound. However, for the reasons I give above, there is an error of law in the Judge's

consideration of the evidence relating to the ETS issue. Accordingly, there is a knock-on error in relation to the delay issue and the Judge's overall consideration of proportionality.

Next Steps

30. For the foregoing reasons, I am satisfied that the Appellants have established by their ground one that there is a material error of law in the Decision. I therefore set aside the Decision. The error which has been established has consequential implications for the Judge's overall credibility findings which in turn impact on the Judge's assessment of proportionality. In short, the Appellants' credibility and the assessment of their human rights claim will have to be revisited in full. All issues need to be redetermined.
31. I have regard to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal and the guidance there given as regards remittals. This case is more akin to that of an appellant having been deprived of the opportunity to have the central part of their case considered rather than there being any procedural unfairness, but it remains appropriate for the appeals to be remitted.

CONCLUSION

32. For the above reasons, there is an error of law disclosed by the Appellants' ground one which infects the entirety of the Judge's findings. For the reasons given above, I set aside the Decision and I do not preserve any findings.

DECISION

I am satisfied that the First-tier Tribunal Decision of Judge E M M Smith promulgated on 11 July 2019 contains a material error of law. I therefore set aside the Decision. I remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge E M M Smith.



Signed
Upper Tribunal Judge Smith

Dated: 17 October 2019